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No. 84-951

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OCTOBER TERM, 1985

No. 84-951

GULF COAST CABLE TELEVISION CO.,

Petitioner,

v.

AFFILIATED CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The government agrees that the court of appeals' decision is wrong. The government agrees that the so-called co-conspirator exception to *Noerr-Pennington* has been improperly applied below to impose antitrust liability on the basis of conduct that was "indistinguishable from the give and take of municipal politics in much of America" (U.S. Br. 9). The government does not question that the validity and scope of the co-conspirator exception are squarely presented in this case. And the government does not suggest that there is any procedural obstacle to hinder the Court's consideration of the important questions presented.

Nevertheless, the government rather hesitantly counsels against review by this Court of a judgment that by now comes

to more than $9 million (including interest and attorneys' fees) and that has no basis other than that "the mayor and council members [of Houston] engaged in a political process in making the franchising decisions" (U.S. Br. 11). Its reasons are weak.

1. That the facts of the case may be "unappealing" or involve "some of the less edifying (if not wholly unfamiliar) aspects of local politics" (U.S. Br. 10, 11) does not bear on the unsoundness of the co-conspirator exception to the *Noerr-Pennington* doctrine. That exception is generated only in cases having claims of undue cooperation between private actors and public officials, and it thus serves to condemn under the antitrust laws political activities that seem "unappealing," though "not wholly unfamiliar" and therefore obviously not limited to this case. After all, *Noerr* itself involved what the Court termed "reprehensible" conduct. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

2. The government agrees that liability in this case and immunity in *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) are "divergent," and that "the result should have been the same in both cases." But it questions whether there is "true conflict" because the *Metro Cable* court might have imposed liability on the present facts; it might, on the government's view (U.S. Br. 11-12), have made the same mistake as the Fifth Circuit. By such reasoning, the tenuous co-conspirator exception is so difficult to apply correctly that the lower courts will repeatedly err. This counsels for, not against, immediate review by this Court.

3. In the last paragraph of its submission, the government considers whether two "prudential" reasons may count against review by this Court: first, that cases "raising claims based on an alleged co-conspirator exception to *Noerr-Pennington* have been infrequent" (U.S. Br. 12); second, that the Local Government Antitrust Act of 1984 may diminish the importance of the decision below.

(a) The co-conspirator exception in fact has been raised in a large number of cases: we are aware of over two dozen decisions that made their way into the reports;[1] unreported cases obviously are far more numerous. And the court of appeals' decision below has been specifically cited as a basis

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1 *See, e.g.*, *Harman* v. *Valley National Bank*, 339 F.2d 564 (9th Cir. 1964); *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Independent Taxicab Operators' Ass'n* v. *Yellow Cab Co.*, 278 F. Supp. 979 (N.D. Cal. 1968); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Cow Palace, Ltd.* v. *Associated Milk Producers, Inc.*, 390 F. Supp. 696 (D. Colo. 1975); *Czajkowski* v. *State of Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd*, 588 F.2d 839 (7th Cir. 1978); *Whitworth* v. *Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978); *Miller & Son Paving, Inc.* v. *Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Mason City Center Associates v. Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979); *Huron Valley Hospital, Inc.* v. *Pontiac*, 466 F. Supp 1301 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981); *Federal Prescription Service* v. *American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1981); *In Re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub nom. Budget Rent-A-Car* v. *Hertz Corp.*, 462 U.S. 1133 (1983); *Atlanta* v. *Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1981); *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 464 U.S. 890 (1983); *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042; *Campbell* v. *Chicago*, 577 F. Supp. 1166 (N.D. Ill. 1983); *Richard Hoffman Corp.* v. *Integrated Building Systems*, 581 F. Supp. 367 (N.D. Ill. 1984); *Scott* v. *Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985); *Independent Taxicab Drivers' Employees* v. *Greater Houston Trans. Co.*, 760 F.2d 607 (5th Cir.), *cert. denied sub nom. Arrow Northwest, Inc.* v. *Greater Houston Trans. Co.*, 106 S. Ct. 231 (1985); *Llewellyn* v. *Crothers*, 765 F.2d 769 (9th Cir. 1985); *Greenwood Utilities Commission* v. *Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985); *Blank* v. *Kirwan*, 216 Cal. Rptr. 718, 703 P.2d 58 (Sup. Ct. Cal. 1985); *Pumpkin Air, Inc.* v. *City of Addison*, 608 F. Supp. 787 (N.D. Tex. 1985).

for denial of summary judgment. *Pumpkin Air, Inc.* v. *City of Addison*, 608 F. Supp. 787, 792 (N.D. Tex. 1985). That the case at bar may well be the first case in which the exception actually resulted in liability makes it appropriate for certiorari, not the reverse, for the doctrine has worked substantial mischief even when it has not resulted in liability. Allegations arguably falling within the exception are easy to make and generate extended discovery, many motions, and trials. Cases such as this are invariably a great expense, and an improper federal intrusion into local government motives and processes. If, as the government says, the co-conspirator exception rarely has been a bride, it nevertheless imposes enormous, recurring costs and burdens by way of wedding preparations.

Avoidance of this expense and burden on the federal courts, on local and state governments, and on private litigants is particularly important in light of the constitutional underpinnings of the *Noerr-Pennington* doctrine. As this Court has often recognized in First Amendment cases, prompt review by this Court is essential lest lawful political activity be chilled during the period while disputed legal issues "percolate" in the lower federal courts.[2] The prospect of multimillion dollar antitrust judgments will have a similar inhibiting effect upon protected activities.

The decision below encourages still further litigation over a questionable "co-conspirator" doctrine that was spawned by a passing comment from this Court and that has already percolated in the lower courts for over 20 years. Such litigation adds to the explosion of municipalities' litigation expenses, which already impede their ability to obtain insurance.[3]

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2 *Cf. Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461 (1958); *American Communications Association* v. *Douds*, 339 U.S. 382, 402 (1950).

3 *See, e.g., Towns Finding it Difficult to Get Affordable Insurance*, N.Y. Times, June 23, 1985, Sect. 11CN at 1, col. 1; *Municipalities Face Dramatic Jumps in Insurance Costs*, Associated Press, November 19, 1985 (available on LEXIS, Nexis library, Omni file).

(b) The Local Government Antitrust Act of 1984 in no way moots the co-conspirator exception to *Noerr-Pennington*. It does not affect private liability for petitioning of federal, state, or local governments. It does nothing to prevent declaratory or injunctive suits against anyone. Nor does it affect in any way the possible "co-conspirator exception" to *Parker* v. *Brown*, 317 U.S. 341, 351-52 (1943).[4]

4. The government, as the nation's leading enforcer of the antitrust laws, has made its principal contribution here as amicus by announcing its view that the decision below is wrong and explaining its reasons for that conclusion. It is important that the Court accept certiorari and itself consider the views shared by petitioner and the government.

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4 At the same time, one of the more mischievous features of the decision below is that it has already caused concern among cities that its rationale conflicts with that underlying the Act. The general counsel to the United States Conference of Mayors, citing the decision below, recently wrote:

> [Under the Act] active local government supervision of the private individual's conduct . . . will have to be demonstrated. This analysis is likely to result in pressure for ongoing local-government supervision by private parties receiving anti-competitive benefits or privileges.
>
> The accomodation of private party demands for "active supervision" by local government, however, will be seen by excluded parties, and possibly by the courts, as evidence of an antitrust conspiracy between local government, or its officials and employees, and the favored party.

S. Rubin and S. Chapple, *Supreme Court Places Limits on Suits Against Local Government*, National Law Journal, June 3, 1985 at 20, 21.

Conclusion

For all the foregoing reasons, for the reasons stated in the petition and reply brief, and for many of the reasons stated in the government's brief, the petition for a writ of certiorari should be granted.

December 20, 1985

Respectfully submitted,

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